IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 15732/2019

In the matter between:

THE BODY CORPORATE OF THE SIX SECTIONAL TITLE SCHEME NO SS 4[....]9 Applicant

and

THE CITY OF CAPE TOWN Respondent

Coram: Justice J Cloete

Heard: 23 November 2022 and 28 February 2023, supplementary notes delivered on 9 and 16 March 2023

Delivered electronically: 26 April 2023

JUDGMENT

CLOETE J:

Introduction

[1] The applicant is the body corporate of a sectional title scheme, The Six, developed on erf 1[....]4, Cape Town, also known as S[...] Street, Zonnebloem, which as I understand it comprises of a few hundred units. The applicant has been duly authorised to launch this application by all of the owners in the scheme.

[2] The respondent ("the City") is the registered owner of neighbouring properties, being seven undeveloped erven forming a large open field as well as a parking lot (which, for sake of convenience, I will refer to as "the site" save where otherwise indicated). The site is situated on the corner of S[...] and K[...] Streets, Zonnebloem, and forms a border between the applicant's units and the Cape Peninsula University of Technology ("CPUT").

[3] The site is located in District Six and the erven which comprise it are subject to land claims instituted in terms of the Restitution of Land Rights Act ("LRA").[1] The erven have been awarded to the successful claimants in terms of a framework agreement concluded on 26 November 2000 between the City, the Department of Land Affairs and the District Six Beneficiary Trust under s 42D of the LRA. Clause 10 of the framework agreement provides *inter alia* that the City shall remain the registered owner of the site until such time as it is transferred to the successful claimants. Despite the elapse of over 22 years transfer of the site has still not taken place.

[4] Since the latter part of 2017 the applicant as well as a number of unit owners have been engaging with the City in an attempt to obtain assistance in relation to what is happening on the site. In short, the applicant's case is that in its current state, the site as well as the activities being conducted thereon by various persons, including the homeless, constitute a societal health, environmental and safety risk.

[5] Although the City raised various technical arguments about hearsay in relation to the applicant's factual allegations, nothing much turns on this. In its answering affidavit the City's deponent accepted that the allegations:

> *'20. …in some measure, may have some basis in fact.*
>
> *21. It is an unfortunate reality that the vacant erven in District Six, in close proximity to the CBD, pose a unique problem in that these properties serve as magnets for the*

[1] No 22 of 1994.

landless and socially marginalised segments of the community. Illegal occupation, vagrancy and associated social problems are a persistent problem in the area…'

[6] In its revised relief the applicant seeks a final interdict against the City directing it to take all steps reasonably necessary to:

6.1 clear the site of the illegal occupants thereon, including but not limited to the institution of legal proceedings for their eviction if they fail and/or refuse to vacate the site having been instructed to do so;

6.2 clear the site of all illegal structures and debris accumulated thereon;

6.3 abate and remediate the nuisance on the site;

6.4 ensure that the site is not used in a manner that contravenes any law or bylaw;

6.5 fence off the site (excluding one of the erven which is the parking lot);

6.5 take the above actions within 6 months from date of this court's order; and

6.6 conduct inspections twice per week to ensure that the fence is not breached and that no illegal occupation of the site recurs.

[7] The applicant also asks that should the City fail to comply with the above, it be given leave to set the matter down on the same papers duly supplemented, for further consideration and/or relief[2] (the structural interdict component).

Points in limine

[2] In its notice of motion the applicant also sought an order that the City rehabilitate the site into a green, accessible space for the community, but it now accepts that such relief is not possible given the terms of the framework agreement.

[8] In its answering affidavit the City raised three points *in limine*, namely: (a) non-joinder; (b) mootness; and (c) impossibility of performance. Only the non-joinder point was persisted with.

[9] This relates to the City's contention that the applicant should have joined the Land Claims Commission ("LCC"), which is the commonly known name of the Department of Rural Development and Land Reform. The reason advanced was that since the land restitution process is not complete the LCC as the organ of state responsible for managing that process in terms of s 6 of the LRA has a direct and substantial interest in these proceedings.

[10] It is fair to say that the LCC has demonstrated a supine approach to this litigation. After the proceedings were launched the applicant's attorneys were advised by the City's representatives of the land claim(s) and further that the site currently "vests" in the LCC as a result. Consequently on 28 October 2019 the applicant's attorney wrote to the LCC annexing a copy of the notice of motion and a diagram depicting the respective erven and their location. The LCC was requested to advise whether it required to be joined (along with the relevant Minister).

[11] Despite numerous undertakings to revert after further active engagement by the applicant's attorney with the LCC, at the time of deposing to the replying affidavit (3 years later on 27 October 2022) the applicant had still not received a formal response.

[12] After I canvassed the deafening silence of the LCC with counsel during the first day of argument the parties agreed to an order (of 24 November 2022) in which, *inter alia*, the court directed that a further copy of the notice of motion, revised order sought by the applicant as well as the order itself be served by the applicant's attorney on the LCC by Friday 2 December 2022; and that the LCC was granted a final opportunity to inform the parties by Friday 27 January 2023 whether it intended to intervene in these proceedings, failing which the parties and the court would accept that it intended abiding the court's decision or any settlement reached. Service was duly effected on 1 December 2022 and when argument resumed on 28 February 2023 the LCC had still

not responded. The matter thus proceeded on the basis that the LCC abides this court's decision.

Pending proceedings for eviction

[13] The City delivered its answering affidavit on 29 October 2021. It disclosed that on 19 May 2021 it obtained final interdictory relief in this court under case number 7349/2021[3] preventing individuals from attempting to enter upon certain specified erven in District Six for the purposes, *inter alia*, of unlawfully occupying or invading those erven; erecting, completing or extending any structure thereon and/or occupying any vacant structure; and granting the City the authority to remove any person found to be in contravention of the order, to demolish any unoccupied incomplete structure; and to remove any possessions (including building materials) found at or near such structures. The erven in respect of which the interdict was granted include those which form part of the site in the present application.

[14] What the City did not disclose is that in the founding affidavit in case number 7349/2021 the deponent stated that:

> *'[45] At present, approximately 28 tents and one wood and zinc structure are present on Erven 1[....]8, 1[....]4 and 1[....]7 which are situated on the corner of H[...] Street and Constitution Street, District Six ("the H[...] Street property"). Erf 9[....]3 is being used to place building materials thereon;…*
>
> *[54] The City will have to obtain an eviction order in respect of those persons as they are unlawful occupiers for the purposes of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 ("the PIE Act")…'*

[15] The erven referred to are part of the site. It was unclear during the first day of argument whether the City had taken any steps in terms of PIE in respect of those occupying the site as at May 2021. Accordingly, this was also canvassed with counsel,

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[3] *City of Cape Town v Those Persons attempting and/or intending to settle on the erven in District Six* (7349/2021) [2021] ZAWCHC 98 (19 May 2021).

and included in the order of 24 November 2022 was an agreement between the parties that the City be granted leave to file a supplementary affidavit detailing the steps, if any, it had taken to procure the eviction of the unlawful occupiers on the site; alternatively, what steps it intended taking to procure such eviction; and in either event the City should include an anticipated timeline for finalisation.

[16] In its supplementary affidavit the City adopted a rather peculiar approach. It took the stance that the earlier affidavit by one of its officials in case number 7349/2021 constituted hearsay evidence, and as such was inadmissible for purposes of the relief sought. It nonetheless went on to say that *'…however,* [the City] *remains committed to the statement in the context of the application, where it was made…'*.

[17] As regards steps taken by the City in District Six the deponent stated that:

> *'20. The final interdict granted* [under case number 7349/2021] *added impetus to an ongoing conversation between the City (as registered owner of land in District Six) and the Department of Land Restitution and Rural Development (as the agency responsible for implementing the restitution of land in District Six).*
>
> *21. The land in District Six has been awarded to successful land claimants. It is earmarked for development to accommodate the relocation of these claimants. The development is to proceed in phases. However, in order to give effect to this development program, the land within District Six has to be rendered vacant. Contextually, the land in question is being managed by the City along with the National Departments of Land Restitution and Public Works. This government collective of stakeholders is alive to the fact that evictions within District Six are necessary.*
>
> *22. However, there are several complexities for government to navigate, which were discussed at a meeting convened on 30 June 2021 between* [those] *parties. These included: First, finding common ground between national and local government. Second, addressing the lack of available land within the Metropole to*

accommodate persons evicted from District Six. Third, adequately securing the site post-eviction to avoid evicted persons moving to vacant erven within the area. Fourth, whether evictions must commence holistically, over the whole District Six area, or incrementally prior to each phase of development. Incremental eviction would probably result in evictees moving to vacant erven in the area, whilst whole-scale eviction would require the availability of sufficient land to accommodate evicted persons which the City does not have. Solutions to these complexities are required.

23. A further meeting was held on 27 October 2021, where the parties continued to debate the above issues. No resolution was reached, however over the following period the parties continued to share information regarding the scale of the relocation process that would be required as well as the continuing land restitution process.

24. A number of meetings were also held at executive level between the Minister for Land Affairs, Minister Didiza, the (then) Mayor, Alderman Dan Plato, and their respective legal teams. These meetings focussed on determining a common strategy on how best to approach the eviction of occupiers from the various erven comprising District Six.

25. In 2021, the Department had appointed counsel for advice on its responsibilities and approach to these issues. Unfortunately, on 26 April 2022 their counsel took ill and became unavailable. Further substantive engagements therefore had to await the appointment of new counsel for the Department. This happened in August 2022. A meeting scheduled on 14 September 2022 did not proceed due to the non-availability of counsel. The City awaits a date from the Department to schedule further engagements in these issues.

26. In the meantime, the City has prioritised urgent evictions that it deemed necessary, both within and outside the CBD, the lead-up to which required the preparation of extensive studies, research and reports to motivate for the relief.

27. The CBD eviction application referred to above [which it is common cause was launched on 12 December 2022] *focuses on the eviction of street people occupying public streets, road reserves and pavements in and around seven sites within the CBD.*

28. I mention the above to illustrate that the City's obligations are wide-ranging and not confined to the provision of one type of accommodation. The City has adopted an Integrated Human Settlements Framework, which is aligned to applicable legislation and policies. In addition the City has promulgated the Integrated Human Settlements Sector Plan for the period ending 1 July 2027… in terms of which it has a number of housing programs, inter alia social housing, GAP housing, finance-linked individual subsidy housing, institutional housing, and emergency and transitional housing.

29. Each type of housing program is aimed at a different category of recipient, according to their needs. The availability of housing, in turn, will affect which area of need can be alleviated first. The City's decision to institute proceedings for the eviction of street people in the CBD, as opposed to instituting proceedings for the eviction of all unlawful occupiers in District Six, must therefore be seen as an exercise of the City's executive powers, and the implementation of policy decisions made on how to best allocate public resources under its stewardship…

30. The City is engaged in discussions with the Department to find a common strategy to facilitate restitutional development in the area. This process is ongoing. Until the City and the Department can agree a common strategy to navigate the associated challenges, it would be premature to commit to any time-line.'

[18] Accordingly the City has not yet instituted any formal proceedings for the eviction of the occupiers of the site. There is no indication by the City as to when that might occur. Moreover, there is no affidavit from any individual in the Department (or LCC) to cast light on the steps, if any, that it has taken or intends to take to assist the City in a meaningful and proactive way regarding the erven which make up the site. One has to wonder, in these circumstances, whether the LCC in fact has any real intention of

ensuring that successful claimants, who have been waiting over 20 years, will ever ultimately return to the place from which they were so cruelly evicted by the apartheid government. This is a matter of grave concern to this court.

[19] According to the City, the redistribution process will allegedly be completed in August 2024. I agree with the applicant's submission that having regard to the delays experienced to date, this seems highly unlikely. Moreover the LCC has elected not to take the court into its confidence regarding how it intends placing the successful claimants in possession of the erven which make up the site even if the process is completed as envisaged by the City. It is thus fair to assume that the prevailing situation will continue in limbo for some years to come. As the applicant submits it is evident that, without more, the parties are in a catch-22 situation. The unlawful conduct will not end until the land is distributed, and the land cannot be distributed until the unlawful activities end. It is against this background that the applicant contends the City must be ordered to take more permanent steps.

[20] The applicant accepts that it has no *locus standi* to institute proceedings for the eviction of the unlawful occupiers of the site. It is also not for this court to interfere with policy-laden decisions made by the City in relation to the eviction of the unlawful occupiers from the site, particularly given that the applicant does not seek to review any such decision(s).

[21] It would thus not be appropriate for this court to order the City to take steps to evict the occupiers of the site at this stage, which would include that part of the relief sought by the applicant to clear the site of any occupied illegal structures and to fence it off, thus preventing those already in occupation from accessing it.

[22] There is also the additional factor of the City's interdict to prevent further unlawful occupation which, given its constitutional and other obligations referred to below, it is presumably duty bound to enforce. However that is not an issue before me but for another court to decide should the applicant or other interested party approach court on

the basis that the City is failing to do so. I thus turn to deal with the other bases upon which the applicant relies.

Nuisance and contravention of laws and/or by-laws

[23] Section 24 of the Constitution provides that everyone has the right to an environment that is not harmful to their health or wellbeing, and that the environment is to be protected through reasonable legislative and other measures. The applicant maintains that the City is in breach both of s 24 and certain of its by-laws due to the latter's failure to take proper steps to prevent the activities on the site.

[24] These are alleged to include dealing in and consuming drugs; open fires that are often left unattended; screaming and shouting at all times of the day and night; public urination and defecation with the attendant reek of foul odours; nudity and open sexual activity; abundant trash in overgrown grass and weeds; and harassment, assaults and intimidation of those who occupy the applicant's units and others in the area.

[25] The City's response is that it does not in any way condone or tolerate the conduct complained of; to the extent that the application is directed at the conduct of persons alleged to be contravening its by-laws this is misconceived since it is not legally liable or responsible for the conduct of private individuals; and that as owner of the site it is not in any way in breach of those by-laws or remiss in enforcing them. It also – strangely – baldly denied that the applicant (in this case obviously the owners of the units) have any s 24 rights. In its supplementary affidavit it accepted however that if found to be in breach of the by-laws the appropriate order would be to compel it to comply.

[26] The applicant also contends that, apart from contravention of the by-laws, the City's lack of constructive action is unlawful under the common law of neighbours or nuisance. The City's response in its answering affidavit was merely that the applicant has failed to make out a case in this regard.

[27] The applicant relies on 5 by-laws:

27.1 the Municipal Planning By-law, 2015[4];

27.2 the Environmental Health By-law, 2003[5];

27.3 the Community Fire Safety By-law, 2002[6];

27.4 the By-law relating to Street, Public Places and the Prevention of Noise Nuisances, 2007[7]; and

27.5 the Integrated Waste Management By-law, 2009[8].

The municipal planning by-law

[28] This prescribes, amongst others, the framework for the management and use of land within the jurisdiction of the City. In terms of s 35 *'no person may use or develop land unless the use or development is permitted in terms of the zoning scheme or an approval is granted or deemed to have been granted in terms of this By-law'.* In terms of s 133(1) the use of land other than in accordance with the development management scheme of the by-law constitutes an offence. The erven comprising the site are zoned for GB5 (General Business Zoning 5), OS2 (Open Space Zoning 2), and TR2 (Transport Zoning 2).

[29] It is necessary to detail what these different types of zoning permit. The GB zoning provides for general business activity and mixed-use development of a medium to high intensity. The primary uses are business premises, a dwelling house, a second dwelling, boarding house, flats, places of instruction, places of worship, an institution, hospital, place of assembly, place of entertainment, hotel, conference facility, service trade, authority use, utility service, rooftop base telecommunication station, multiple

4 *Provincial Gazette Extraordinary* 7414 of 29 June 2015.
5 *Provincial Gazette* 6041 of 30 June 2003.
6 *Provincial Gazette Extraordinary* 5832 of 28 February 2002.
7 *Provincial Gazette* 6469 of 28 September 2007.
8 *Provincial Gazette* 6651 of 21 August 2009.

parking garage, private road and open space. Consent uses are an adult shop, adult entertainment business, adult services, informal trading (as defined in the by-law and which does not include the activities on the site), expo centre, motor repair garage, warehouse, freestanding base telecommunication station, wind turbine infrastructure, transport use, helicopter landing pad and service station.

[30] The OS2 zoning provides for active and passive recreational areas on public land, as well as the protection of landscape and heritage areas, including woodlands, ridges, watercourses, wetlands, and the coastline. The primary uses are public open space and environmental conservation use. Consent uses are environmental facilities, tourist facilities, a utility service, cemetery, rooftop base tele-communication station, freestanding base telecommunication station, wind turbine infrastructure, cultural and social ceremonies, urban agriculture, informal trading, harvesting of natural resources and air and underground rights.

[31] The TR2 zoning provides for public streets and roads, whether constructed or still to be constructed, as well as premises for the public parking of operable motor vehicles. The primary uses for this zoning are public street, public road and utility service uses. Consent uses are informal trading, a multiple parking garage, wind turbine infrastructure and air and underground rights.

[32] The applicant correctly contends that the activities on the site do not conform to any of the uses permitted and are thus illegal. The City's stance is that it cannot be said that it is making use of the site for these activities and nor can it be held liable for any such conduct committed by the unlawful occupants.

[33] In *Intercape Ferreira Mainliner (Pty) Ltd v Minister of Home Affairs and Others*[9] the applicant sought to interdict the respondent from operating a refugee office on its neighbouring property on the bases that: (a) the use of the property contravened the City's zoning scheme; and (b) the refugee office constituted a common law nuisance.

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[9] 2010 (5) SA 367 (WCC); followed in *Mayfair Residential Association v City of Johannesburg Metropolitan Municipality* 2021 JDR 1957 (GJ)

The applicant's complaints included noise interference, health concerns and safety and security issues. The court found that the state is bound by its own zoning schemes:

'[100] Under the Constitution a foundational value of our country is the supremacy of the Constitution and the rule of law (s1(c)). The notion of a State which is not in general bound by legislation strikes one as antithetical to the rule of law. Even more anomalous is the proposition that the State in this country should, in its various manifestations under the Constitution, be assumed not to be bound by legislation merely because this was the position of the Crown developed over hundreds of years by the common law of England. Furthermore, the presumption does not appear to sit comfortably with the constitutional regime for the legislative competencies of the various spheres of government. The legislative powers of the national, provincial and municipal legislatures are powers conferred on them directly by the Constitution; the provincial and local legislatures do not exercise powers notionally delegated to them by national government (cf City of Cape Town and Another v Robertson and Another 2005 (2) SA 323 (CC) paras 53-60). Under common law, the proposition would have been that the Crown or State President in assenting to legislation was not thereby presumed to be agreeing that the State (whose head he or she was) should be bound. But where (for example) a provincial legislature under our Constitution enacts a law within its competence and such law is assented to by the provincial premier, why should it be assumed that the provincial legislature was not intending thereby to bind (for example) the national government or municipalities within its area? And if those other spheres of government are bound, why not the province itself?...

[105] In accordance with the common law approach, the fact that legislation is in the public benefit is relevant but not sufficient to establish that the State is bound. Nor is it enough to show that the State would not be prejudiced if it were bound (Raats at 263B); the court must be satisfied that the objects of the legislation would be frustrated if the State were not bound. Now the court can, I think, take judicial notice of the fact that the national and provincial governments are significant owners and users of land in the Western Cape (and indeed in the country as a whole). From a town planning perspective, the control over the utilisation of land customarily involves

the allocation of the same use rights to all properties in a particular area so that one will have areas set aside for residential use, other areas for commercial use and yet others for industrial use, and so forth. The purpose of town planning would, in my view, be frustrated if the State as a significant user of land were free to disregard zoning restrictions. Even if only a few pieces of land in a particular area were free to be used by the State contrary to the zoning for that area, the character of the area and the welfare of the members of the community in that area would be jeopardised and the planning objectives of the local authority (as approved by the province) frustrated.'

[34] I am in agreement. To my mind the City has either misconceived its obligations or is seeking to hide behind the fact that since its own officials are not conducting the activities it is not obliged to do anything to curb them. The City's stance fails to recognise its constitutional obligation to all citizens in its area of responsibility, and it has failed to advance any basis upon which it could be concluded that its decision not to properly enforce its own by-law is rational or excusable. While it is so that it has taken a policy decision to postpone the eviction of the unlawful occupiers (which cannot be interfered with in these proceedings for the reasons already given) this does not mean that it can simply abrogate its other responsibilities.

[35] In argument the City sought to distinguish the facts in the present matter from those in *Intercape* on the basis that the site was unlawfully occupied without its knowledge; it has not consented thereto; and it does not condone the activities there. But, as stated, this argument overlooks its own obligations. The City surely cannot be permitted to rely on a policy decision in relation to the postponement of an application to evict as an excuse not to conduct itself lawfully. It needs to take reasonable and appropriate steps, at the very least, to curb the activities on the site. How exactly it does that is not for this court to prescribe since this is for the City to decide. But it must do something.

The environmental health by-law

[36] In addition to the applicant's s 24 right the City also has an obligation under s 152 of the Constitution to strive to promote a safe and healthy environment. This section provides in relevant part that:

> *'152.* ***Objects of local government***
> *(1) The objects of local government are - …*
> *(d) to promote a safe and healthy environment; and…*
> *(2) A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1).'*

[37] In *Mayfair*[10] this was emphasised as follows:

> *'[47] As rightly submitted by Mr Ohanessian, the City of Johannesburg is an organ of state that is obliged to respect, protect, promote and fulfil the rights in the Bill of Rights. It is also obligated, under section 152(1) of the Constitution, to, among other things, ensure a safe and healthy environment… The City therefore has a constitutional obligation to enforce the applicable land use scheme and to ensure the applicants' right to an environment that is not harmful to their health or wellbeing.'*

[38] The environmental health by-law prohibits and regulates, *inter alia*, health nuisances. It defines a "person" as including any sphere of government. The most relevant provisions for present purposes are s 2(1) and s 8. These provide that no person shall:

> *'2… (1) Allow any erf to be overgrown with bush, weeds or grass or other vegetation… to such an extent that, in the opinion of the Council, it may be used as shelter by vagrants, wild animals or vermin or may threaten the public health or the safety of any member of the community…*

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[10] See fn 9.

8… keep, cause or suffer to be kept on any premises any accumulation or deposit of filth, rubbish, refuse, manure, other offensive matter, or objectionable material or thing so as to be a health nuisance.'

[39] The applicant submits that the City, as owner of the site, is in breach of these provisions, amongst others, but that even if it were not the owner, the City nonetheless has a constitutional obligation to ensure that the occupants of the site do not contravene the relevant provisions.

[40] The City denies that, as owner, it has allowed any contravention of the by-law to occur on the site. Its explanation is that in order to comply with its obligations as owner, it is required to issue a tender for grass cutting services at its cost. In the 2019 financial year this totalled R330 206.41. However, since District Six needs to be cleared twice a year the annual cost is double.

[41] To my mind this explanation falls far short of a reasonable explanation. It pertinently fails to address how cutting the grass twice a year is sufficient to prevent threatening the public health or safety of any member of the community, or what steps the City takes to prevent the accumulation or deposit of filth, rubbish, refuse and the like on its site. The City has also wholly failed to engage with its obligation as local government independent of any duty arising from its ownership of the site.

[42] Either the City has chosen to be dismissive of the applicant's complaints or it has failed to understand its obligations. Neither is good enough. I do not repeat what has already been stated regarding the City's prerogative to determine how it fulfils its obligations, but the same applies to the by-law under discussion as well as those which follow.

The community fire safety by-law

[43] This by-law is aimed at promoting and achieving a fire-safe environment for the benefit of all persons within its jurisdiction. For present purposes the following provisions are most relevant:

'26(1) The owner or person in charge of the premises or a portion thereof must not allow combustible waste or refuse to accumulate in any area or in any manner so as to create a fire hazard or other threatening danger...

34(2) The owner or person in charge of the premises may not permit vegetation to grow or accumulate thereon, or other combustible material to accumulate thereon, in a manner likely to cause a fire hazard or other threatening danger.'

[44] The City's answer is that its interventions are responsive in nature, i.e. it acts on receipt of a complaint. It also claims that the by-law permits open fires for cooking purposes in terms of s 35(2). However s 35(1) and (2) provide that:

'(1) The lighting of fires and the disposal of combustible material by burning is prohibited, save in the circumstances set out in this section.
(2) A person may light a fire or use a flame-emitting device for the purpose of preparing food or any other domestic purpose in a manner which will not cause a fire hazard or other threatening danger or where such a fire is not precluded by any other legislation.' (emphasis supplied)

[45] Accordingly the City's understanding of its obligation in respect of open fires is incorrect. As far as vegetation growth is concerned the City again relies on its grass cutting service twice a year which, as already stated, is insufficient (and if it were, then the unanswered question is why the site is overgrown).

[46] The deponent to the answering affidavit does however point out that the site is monitored regularly to assess risks. Where necessary, compliance notices in terms of s 6 of the by-law are issued by the Department of Fire Safety to the City as owner. In addition, statistics provided for the site indicate that over the 3 year period from 2017 to

2019 a total of 31 complaints were responded to. The City also annexed one of its notices to comply in which the Department of Fire Safety conducted an inspection of one of the erven on the site, seemingly in December 2019. The notice records that:

> *'The inspection revealed the following:*
>
> *Contraventions:*
> *Permit vegetation/combustible material to overgrow/accumulate on premises in a manner likely to cause a Fire Hazard or other threatening danger.*
> *Permit rubbish to accumulate on premises in a manner likely to cause a Fire Hazard or other threatening danger.*
>
> *Remedial Action:*
>
> *1. Housekeeping to be improved, accumulation of combustible material must not create a Fire Hazard or other threatening danger:*
>
> *a) Vegetation to be cleared and maintained;*
> *b) Rubbish to be removed;*
> *c) Informal structures to be removed.*
>
> *You are hereby given notice in terms of Section 55(3) to comply with the above provisions on or before 2020-01-20…'* (emphasis supplied)

[47] The notice went on to inform the City that failure to comply was an offence as prescribed in the Fire Services Act.[11] Despite this notice, the City elected not to take the court into its confidence about the manner in which it complied, or whether it complied at all. Accordingly, as correctly submitted by the applicant, on its own version the City has breached this by-law on at least one occasion and probably more, given its statement that *'where necessary, compliance notices… are issued'.* What is remarkable is how the City interprets the compliance notice:

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[11] No 99 of 1987.

'48. …A copy of such a notice is attached… in which the City is requested to improve its housekeeping of the affected property by (a) clearing vegetation, (b) removing rubbish and (c) removing informal structures.' (emphasis supplied)

[48] The City thus appears to view a demand to comply under threat of being charged with an offence, issued by one of its own Departments, as nothing more than a "request". This does not bode well for the applicant and calls out for intervention by this court.

The street, public places and prevention of noise nuisances by-law

[49] This by-law is aimed at controlling, *inter alia*, public nuisances since in accordance with its preamble *'aggressive, threatening, abusive or obstructive behaviour of persons in public is unacceptable to the City'.* The applicant's complaint in this regard is that pedestrians and persons staying in the area are harassed daily for food and money by the occupants of the site. This is generally accompanied by abusive and threatening language in order to break down any resistance. Those having to walk across the site to go to CPUT, the Muir Street Mosque or the MyCiti bus stop have on occasion been robbed, stabbed, victimised and intimidated. Women are subjected to sexual innuendo and physical threats. One of the owners in the applicant's building has witnessed an illegal occupant threaten to attack a security guard with acid.

[50] The relevant provisions of the by-law relied upon by the applicant are:

*'**2. Prohibited behaviour***

(1) No person, excluding a peace officer or any other official or person acting in terms of the law shall –

(a) when in a public place –

(i) intentionally block or interfere with the safe or free passage of a pedestrian or motor vehicle; or

(ii) intentionally touch or cause physical contact with another person, or his or her property, without that person's consent;

(b) approach or follow a person individually or as part of a group of two or more persons, in a manner or with conduct, words or gestures intended to or likely to influence or to cause a person to fear imminent bodily harm or damage to or loss of property or otherwise to be intimidated into giving money or other things of value;

(c) continue to beg from a person or closely follow a person after the person has given a negative response to such begging…

(3) No person shall in a public place –

(a) use abusive or threatening language;

(b) fight or act in a riotous or physically threatening manner…

3. Noise nuisance

No person shall in a public place –

(a) cause or permit to be caused a disturbance by shouting, screaming or making any other loud or persistent noise or sound…'

(emphasis supplied)

[51] The applicant submits that, once again, the City is in contravention of this by-law as well as its constitutional obligation to enforce it. That may or may not be the case, but the applicant has not sought any relief in relation to conduct by the unlawful occupants

of the site in a “public place”. The orders which it seeks are directed at the site itself and accordingly I deal no further with this ground.

The integrated waste management by-law

[52] This by-law aims to regulate and control waste management, including littering and illegal dumping, to ensure a safe, healthy and sustainable environment and the protection of the rights of individuals. A “person” is defined as including any divisional or municipal council or like authority. Section 15(5) provides that:

> *‘(5) A person who owns land or premises, or who is in control of or has a right to use land or premises, may not use or permit the use of the land or premises for unlawful dumping of waste and must take reasonable steps to prevent the use of the land or premises for that purpose.’* (emphasis supplied)

[53] That the City has permitted rubbish to accumulate on the site is beyond dispute. This much is evident from the notice to comply referred to above, and is seemingly only one example thereof.

[54] In its founding affidavit the applicant only relied on s 15(1) which prohibits littering by persons or allowing a person under one’s control to do so. The City responded as follows:

> *‘65. There is no allegation made that the City has acted in contravention of the By-law. Similarly, since any illegal occupants/transients cannot be considered to be under the City’s control, there is no cause of action against the City…*
>
> *66. Accordingly any claim in terms of this By-law must fail.’*

[55] While it may be that the applicant only later relied on s 15(5) as well, the compliance notice was attached by the City to its own answering affidavit and s 15(5)

was also canvassed in argument. Accordingly there can be no prejudice to the City if this court has regard to s 15(5) in determining this application.

Nuisance at common law

[56] In *Intercape* the court explained "nuisance" as follows:

> *'[142] In the context of the present case, the term "nuisance" connotes a species of delict arising from a wrongful violation of the duty which our common law imposes on a person towards his neighbours, the said duty being the correlative of the right which his neighbours have to enjoy the use and occupation of their properties without unreasonable interference. Wrongfulness is assessed, as in other areas of our delictual law, by the criterion of objective reasonableness, where considerations of public policy are to the fore (see, generally,* East London Western District Farmers' Association and Others v Minister of Education and Development Aid and Others *1989 (2) SA 63 (A) at 66G-68A;* Dorland and Another v Smith *2002 (5) SA 374 (C) at 383B-C and 384A-C). For a recent statement by this court of the factors which typically fall to be assessed in determining reasonableness, see* Laskey and Another v Showzone CC and Others *2007 (2) SA 48 (C) paras 19-21; see also LAWSA Vol 19 (2nd Ed) paras 173-185.*
>
> *[143] Since the applicants in the present case do not claim damages but an interdict in respect of an allegedly ongoing nuisance, fault on the part of the Department and Cila is not an element of the cause of action (see* Regal v African Superslate (Pty) Ltd *1963 (1) SA 102 (A) at 106A and 120G).'*

[57] In the present matter there is no genuine dispute that the unlawful occupants of the site are conducting the activities of which the applicant complains. In *Mayfair*[12] the following was said:

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[12] See fn 9 above.

'[36] Neighbours have the right to the use and enjoyment of the property that they occupy or upon which they reside… Additionally, section 24(a) of the Constitution provides that the applicant has the right to an environment that is not harmful to their health or wellbeing. In order to determine whether a nuisance is actionable the question before me is whether the nuisance is unreasonable and cannot be expected or tolerated in the circumstances. This requires a test not only of what a reasonable person would tolerate, but more importantly "an objective evaluation of the circumstances and milieu in which the alleged nuisance has occurred"…

[37] In making this determination the court may take into account any relevant factors, including the type of locality in which the nuisance emanates…'

[58] In the present matter, the nature, extent and persistence of the activities complained of on land adjacent to the units of the applicant can only lead to one reasonable conclusion, namely that the activities give rise to a nuisance that the applicants cannot reasonably be expected to tolerate. This is exacerbated by the fact that the City is unable to provide the court with any concrete indication of when the nuisance is likely to abate as a consequence of the unlawful occupants being evicted from the site.

[59] The nuisance complained of is similar to that in *Redefine Properties Ltd v The Government of the Republic of South Africa and Others*.[13] The adjacent property was vacant, save for unlawful occupation which began in 2018. As in the present case, there was no access to running water, sewage disposal or any other amenities. The applicant considered the living conditions and activities of those on the adjacent property to be a nuisance as well as a health and fire hazard.

[60] It stated that it generated income from its property and would likely suffer significant financial loss should its tenant terminate the lease agreement due to the unlawful occupation of the adjacent property. It was also alleged that the condition of the adjacent property posed a threat to the safety of both the applicant's tenant and the

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unlawful occupiers themselves. It sought an order, *inter alia*, directing the respondent to abate the nuisance. The court held:

> *'[36] I find that the applicant has established that there is a nuisance of a private nature occurring on the Adjacent Property. But it does not really make any difference if the nuisance could also be classified as a public nuisance. The nuisance interferes with the applicant's use and enjoyment of the Property (or those occupying the Property with the applicant's consent) due to the interference with the comfort of human existence on the Property. The applicant's tenant on the Property cannot inhabit and occupy the Property in the physical comfort, convenience and wellbeing due to the violations stated above emanating from the Adjacent Property. The interferences are beyond what the tenant of the Property or the applicant can be expected to tolerate. The nuisance ought to be remedied.'*

Entitlement to interdictory relief

[61] Given the above analysis I am persuaded that the applicant has established a clear right to the City's adherence to the relevant provisions of the Constitution and its own by-laws. It has also established a clear right under the common law to prevent the continuation of the nuisance occurring on the site.

[62] The applicant has also shown an injury committed or reasonably apprehended. The injury (or infringement) is ongoing. Given what appears to be the increasing gravity of the situation, it is fair to accept the applicant's contention that it will not be long before circumstances arise in which serious bodily harm to one of its members or property is caused.

[63] Not even the City seriously suggests that the applicant has any alternative satisfactory remedy at its disposal. The best it could come up with, raised for the first time on the second day of argument when it had also appointed senior counsel, was that the applicant should approach the City Ombudsman in terms of the City

Ombudsman By-law for the purpose of having the latter assist the City in fulfilling its obligations.

[64] The requirements for final interdictory relief have thus been met. However the applicant fairly acknowledges that the most appropriate remedy would be a structural interdict. In my view this would afford a reasonable opportunity for the City to determine and take appropriate remedial steps while at the same time the court's order would not interfere with the policy decision made by the City in respect of the eviction of the unlawful occupants of the site. The order that follows attempts to properly address this.

Costs

[65] In its notice of motion and founding affidavit the applicant sought costs on the ordinary scale. After having received the answering affidavit and perusing the City's case in the application under case number 7349/2021, the applicant decided to ask for costs on the attorney and client scale. The reasons advanced in its replying affidavit were as follows.

[66] First, the applicant represents a group of individuals utilising their after-tax income to approach court for an order compelling the City to uphold the Constitution after years of largely fruitless engagement. Second, this application was threatened, in very specific detail, following a lengthy process of individual complaints, and the City did not even afford the applicant the courtesy of a response. Third, after having to incur legal costs to launch this application the City's response was woefully inadequate. In these circumstances the applicant submits that anything short of an award of attorney and client costs will cause it to be unfairly out of pocket.

[67] In my view most of the applicant's submissions on this score have merit. In addition, although the order of 24 November 2022 granted the City leave to file a supplementary affidavit on specific limited issues, as the applicant correctly points out, the affidavit that followed also raised other matter. The applicant was thus obliged to deal with that as well which resulted in it incurring yet further costs.

[68] This is not one of those cases where, for example, a private individual is aggrieved by the City's refusal to approve building plans. The applicant's members have demonstrated that throughout they have been as reasonable and accommodating towards the City as possible, and that this application was really a last resort. The applicant should thus not be out of pocket as far as reasonably possible, given also that it has been substantially successful.

[69] **In the result the following order is made:**

1. Subject to paragraph 2 below, the respondent is directed, by no later than FRIDAY 27 OCTOBER 2023, to take steps to abate and/or reasonably remediate the nuisance on erven 9[....]3, 1[....]4, 1[...]6, 1[...]6, 1[....]7, 1[....]8 and 1[….]0, Cape Town ("the site"), which is interfering with the use and enjoyment of erf 1[....]4, Cape Town on which The Six Sectional Title Scheme No SS 4[....]9 ("the property") is situated;

2. The abatement and/or remediation referred to in paragraph 1 above is directed at curbing the criminal activities on the site as well as directing the respondent to comply with the Environmental Health By-law (PG 6041 dated 30 June 2003), the Community Fire Safety By-law (PG 5832 dated 28 February 2022 as amended), and the Integrated Waste Management By-law (PG 6651 dated 21 August 2009 as amended), so that the use and occupation of the site does not continue to pose a threat to the safety and wellbeing of those occupying the property as well as safeguarding the property itself;

3. The respondent is directed to provide the applicant's attorney of record with a written report of the steps taken in accordance with paragraphs 1 and 2 above by no later than FRIDAY 17 NOVEMBER 2023;

4. The applicant is granted leave to approach court thereafter on the same papers, duly supplemented where necessary, for further or alternative relief; and

5. The respondent shall pay the costs of this application on the scale as between attorney and client, including any reserved costs orders and the costs of two counsel where so employed.

J I CLOETE

For applicant:	Adv C **Cutler** and Adv J **Hamers**
Instructed by:	Smith Tabata Buchanan Boyes (Mr M Bey)
For respondent:	Adv B **Joseph** SC and Adv R **Abrahams**
Instructed by:	Herold Gie Attorneys (Mr A Meyer)